IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 41 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

@

IBRAHIM @ IBU KALUMIYA MANSURI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 41 of 2001

MR MM TIRMIZI for Petitioner No. 1

Mr.HH PATEL, A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 09/07/2001

ORAL JUDGEMENT

1. This Revision is directed against the order of the Special Judge passed on 13.11.2000 whereby he has rejected the application of accused Nos.4 & 5 for being discharged of the offences u/s.302 & 120-B of the Indian

Penal Code and Section 135(1) of the Bombay Police Act.

2. Shri M.M.Tirmizi, learned Counsel for the revisionist and Shri H.H.Patel, learned A.P.P. have been heard.

3. It may be mentioned that applications of accused Nos.4 & 5 for discharge u/s.227 Cr.P.C. was rejected, but the instant revision has been filed only by Ibrahimbhai @ Ibu Kalumiya Mansuri, who is said to be accused No.5, before the trial Judge. As such the case of accused No.4 for discharge is not being considered nor this order shall apply either in favour or against the accused No.4.

4. Several objections have been taken by the learned A.P.P. regarding jurisdiction of this Court to interfere in such matters and also in what manner the impugned order should be examined and disturbed.

5. Learned A.P.P. Shri Patel has referred to the case of STATE OF U.P. v/s. UDAINARAYAN & ANR., reported in (1999) 8 SCC 741 and has drawn my attention in what manner the revisional court can exercise powers of interference in such matters. The Apex Court, in this case, found that an application for discharge of the accused, who was facing the trial u/ss. 8, 10, 13(2) and 13(1)(d) of the Prevention of Corruption Act read with Section 120-B of the Indian Penal Code was rejected by the trial Court in exercise of powers u/s. 239 Cr.P.C. but the High Court in exercise of revisional power discharged the accused persons and while discharging them the High Court has scrutinized the evidence and advancing elaborate arguments. On these facts it was held by the Apex Court that the High Court exceeded its jurisdiction inasmuch as it acted as if it were considering an appeal against conviction. The order of discharge passed by the High Court was, therefore, set aside by the Apex Court. There can be no dispute about proposition of law laid down by the Apex Court in this case. The revisional court can not reappraise the evidenciary value of the material collected by the investigating agency while submitting the charge sheet. The case before me is however a case u/s. 227 Cr.P.C. and not u/s. 239 Cr.P.C. It is not a warrant trial which is to be conducted by the Sessions Judge.

6. Section 227 of the Code of Criminal Procedure provides that if upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the

prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing. It is clear from this section that if upon considering the documents submitted by the prosecution and after hearing the submission of the accused and the prosecution the trial Judge finds that there is no sufficient ground for proceeding against the accused he shall discharge him and shall also record his reasons for discharging the accused. The important words used in this section are that there is no sufficient ground for proceeding against the accused. There can be no sufficient ground for proceeding against the accused if no material or evidence has been collected by the Investigating Agency in the course of investigation. It is true that u/s.227 Cr.P.C. it is not to be seen whether there is sufficient evidence for conviction of the accused or not, but at the same time it has to be considered whether there is sufficient ground for proceeding against the accused. Sufficiency of ground is determined with reference to the material and evidence collected against the accused during investigation. Such material and evidence, may be in the nature of direct evidence, circumstancial evidence, documentary evidence, dying declaration etc. made by the deceased and in case of conspiracy there must be some evidence from which it can be gathered that there is ground for presuming that the accused has committed an offence of conspiracy. In cases of conspiracy direct evidence can rarely be collected and it is only on the basis of circumstancial evidence or the confession made by the accused, not before the Police Officer, may also furnish some ground for proceeding against such accused for committing the offence of conspiracy punishable u/s.120-B I.P.Code. In this case state of affairs is highly astonishing. In the impugned order the learned Special Judge has mentioned in Para : 2 that on behalf of the State learned A.P.P. Shri Jhala has submitted that it is true that any of the witnesses has not disclosed the name of accused but they are highly influential. There was thus categorical admission from the side of the prosecution, after considering the entire material collected during investigation, that no witness had named the revisionist nor had disclosed the participation of the revisionist in commission of offences for which he is proposed to be tried. Thus, it is a case of total lack of direct evidence against the revisionist accused. Simply by observing that the accused are influential the learned trial Judge could not have presumed that there is any material for proceeding against the accused.

7. So far as circumstantial evidence is concerned, the learned A.P.P. could not bring it to my notice that any circumstantial evidence has been collected against the revisionist on which he can be proceeded and tried under the aforesaid sections. Thus, there is no circumstantial evidence against the revisionist.

8. The Trial Judge had also relied upon the fact that there were series of incidents during this time and during the course of investigation when the police have received information the present accused were arrested. Mere arrest of accused on some information received by the police, which is not disclosed in the record, it cannot be said that such arrest by itself constitutes ground for proceeding against the revisionist. Thus, mere fact of arrest of the revisionist does not furnish any ground for proceeding against him.

9. The next fact mentioned in the trial Court's order is that accused No.4 is also co-accused in other case bearing Atrocity Criminal Case No.35 of 2000 for more or less the same charges and therefore both the applications be rejected. Mere pendency of a case against co-accused is no ground for inferring any material or for holding that there is sufficient ground for proceeding against the revisionist in this case.

10. The next material relied upon by the learned Trial Judge is that when any co-accused has disclosed the name of other co-accused evidenciary value is required to be tested and circumstances are also required to be tested and it is possible only when the witnesses enter the witness box and give evidence before the Court. This observation is self contradictory. When the trial Judge found and it was admitted fact from the side of the prosecution that no witness has disclosed the name of the revisionist there would be no purpose in examining the witnesses against the revisionist and compelling him to face trial. So far as the evidenciary value of the disclosure made by the co-accused is concerned the first important fact is as to who was the co-accused who made disclosure implicating the revisionist and the second important fact is what disclosure was made by the co-accused against the revisionist. On these two points the learned A.P.P. could not furnish any information nor could bring to my notice the name of co-accused who implicated the revisionist and also what was the statement of the co-accused on which implication of the accused can be inferred. If it is a case of statement of co-accused it must be the statement u/s. 161 of the Cr.P.C. In SURESH CHHOTALAL VERMA v/s. STATE OF

GUJARAT, reported in 2001 CRI.L.J. 2286 I had an occasion to examine the evidenciary value of the statement of co-accused u/s.161 Cr.P.C. and I had taken a view that the statement of co-accused u/s.161 Cr.P.C. does not constitute prima facie evidence against the accused and such accused is liable to be discharged if statement of co-accused only is available against him. Learned A.P.P. could not point out any decision contrary to the view taken by me.

11. Learned A.P.P. has also tried invain to point out that this very revisionist is an accused who made confession that he had given few blows to injured who ultimately died, but he could not show me such statement made by the revisionist. He has tried to refer the Inquest Memo and various Recovery Memos, but there is no wispher in these Memos that the revisionist had made confession that he had given few blows to the deceased.

12. It would also be relevant to point out the provisions of Sections 24 to 26 of the Evidence Act. Section 24 of the Evidence Act makes confession made by the accused person irrelevant in criminal proceeding if such confession was made and appears to the Court to have been made or caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. This section has no application to the facts of the case before me.

13. Section 25 of the Indian Evidence Act provides that no confession made to a police, shall be proved as against a person accused of any offence. Thus, under this section confession made by an accused to a Police cannot be proved against a person accused of any offence. It is, therefore, further clear that confession of co-accused before the Police cannot be proved against other co-accused of the same offence. It has not been clarified by the learned A.P.P. whether confession was made by co-accused before the Police or not. More over since the actual confessional statement made by the co-accused has not been placed before me it can hardly be accepted that any such confession or confessional statement was made by any co-accused implicating the revisionist.

14. Section 26 of the Indian Evidence Act provides

that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate shall be proved as against such person. Thus, under this section also, since on the factual side it is not shown that any confessional statement was made by the co-accused before a Police in presence of a Magistrate, the so called confessional statement made by the co-accused cannot be used against the revisionist.

15. Reliance was placed from the side of the respondent on Section 10 of the Indian Evidence Act as to how the case against a conspirator can proceed. It was argued on the strength of this section that the statement of co-accused, who is also charged for conspiracy, can be used against the revisionist. Section 10 of Evidence Act provides that where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. Reference was also made to illustration of Section 10 of the Evidence Act, but what is mentioned in the illustration is lacking in the instant case because nothing has been said or brought on record as to what part was played by the revisionist in the alleged conspiracy. Consequently in the absence of material constituting conspiracy it cannot be believed that there is reasonable ground for proceeding against the revisionist u/s.120-B of I.P.Code.

16. So far as Dying Declaration is concerned the learned A.P.P. conceded that it was not against the revisionist and that the deceased implicated three other persons, but not the revisionist. As such Dying Declaration of the deceased also is no material against the revisionist.

17. Reference was made to Inquest Memo and various recovery Memos under which recovery was made u/s.27 of the Indian Evidence Act but in these Inquest Memos and recovery Memos as well no mention has been made even regarding the name of the revisionist, what to say of the part played by the revisionist in the commission of murder or hatching conspiracy to commit murder.

18. Learned A.P.P. has relied upon the case of STATE

OF MAHARASHTRA v/s. SOM NATH THAPA & ORS., reported in (1996) 4 S.C.C. 659. However, to my mind the verdict of the Apex Court in this case cannot be applied to the facts of the present case before me. In this case the Apex Court has held that whether charge should be framed or not test of existence of prima facie case is material. If there is ground for presuming that the accused has committed the offence it can be said that a prima facie case has been made out against the accused. Even if Court thinks that the accused might have committed the offence it can frame the charge. At the stage of framing of charge probative value of the materials on record can not be gone into. It has been further held that while framing the charge the Court must apply its judicial mind to the material placed on record. Materials on record must satisfy the mind of the Court framing the charge that the commission of offence by the accused in question was probable.

19. In the case before me there is no material on record on the basis of which it can be said that there are grounds for proceeding against the revisionist. Consequently the verdict of the Apex Court in this case can not help the respondent.

20. Learned A.P.P. has also relied upon the case of STATE OF HIMACHAL PRADESH v/s. KRISHAN LAL PARDHAN & ORS. reported in (1987) 2 SCC 17. It has been held by the Apex Court in this case that it is not necessary that every conspirator must take part in each and every conspiratory act. However, in the case before me there is no evidence or material or link evidence to connect the participation of the revisionist in any part of the conspiracy. Consequently on the basis of this case also the respondent can not succeed.

21. The last case relied upon by the learned A.P.P. is the case of HARDEO SINGH v/s. STATE OF BIHAR & Ors., reported in 2000 CRI.L.J. 2978. In this case the Apex Court held that some general evidence pertaining to the conspiracy would be sufficient to form part of the charge of conspiracy in the chargesheet. As a matter of fact some connecting link or connecting fact somewhere would be good enough for framing of charge since framing of charge and to establish the charge of conspiracy cannot possibly be placed at par. To establish the charge of conspiracy there is required cogent evidence of meeting of two minds in the matter of commission of an offence, in the absence of which the charge cannot be sustained. This is however not so, in the matter of framing of charge since the incidence of the offence shall have to

be investigated. I am affraid the verdict of this case helps the respondent. Since there is no evidence collected during investigation that the revisionist conspired in commission of murder, what has been laid down by the Apex Court in this case can not help the respondent in failure of revision. If some evidence on conspiracy would have been collected by the Investigating Agency then only the law laid down in this case by the Apex Court could be applied at the time of framing of charge no matter such evidence collected was not sufficient for convicting the revisionist on the charge of conspiracy.

22. To sum up therefore it can be said that it is not a case where the High Court is going to scrutinize the evidence and take its own view whether the charge should be framed or not. On the other hand this is a case where there is total absence of material and ground on the charges proposed to be framed against the revisionist u/s.302 & 120-B I.P.Code. There is no direct evidence against the revisionist nor there is any circumstantial evidence nor any documentary evidence has been collected against the revisionist. Dying Declaration is also not implicating the revisionist. There is no material on the proposed charge u/s.120-B. The inferences drawn by the trial Judge in the impugned order are beyond the material on record and based on his assumptions and surmises. These assumptions could be justified only if there would have been some material to indicate that there are reasonable grounds for proceeding against the revisionist. Simply because the accused or the revisionist is influential person is no ground for proceeding against him u/s.302 or 120-B I.P.Code. Insistence of the trial Judge to examine the witnesses who have not nominated the revisionisnist nor they have said anything against the revisionist would be nothing but a futile exercise.

23. In the result I find that there is no material for coming to a conclusion that there are reasonable grounds for proceeding against the revisionist to frame charges u/ss.302 and 120-B I.P.Code and also under Section 135(1) of the Bombay Police Act. The trial Judge was, therefore, in error in rejecting the request of the revisionist for discharge. The revision, therefore, succeeds in part only in favour of the revisionist, accused No.5 and the impugned order is set aside only against the revisionist. He shall stand discharged forthwith.

Date : July 09, 2001 (D. C. Srivastava, J.)

sas